

# Selected Federal Wildlife and Environmental Laws Applicable to Wind Energy Development

Toward Wildlife-Friendly Wind Power:  
A Focus on the Great Lakes Basin

Toledo, OH  
June 27-29, 2006

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# National Energy Considerations

- EXECUTIVE ORDER 13212, Actions to Expedite Energy-Related Projects, 66 FR 28357 (May 22, 2001), as amended by EO 13286, 68 FR 10619 (March 5, 2003) & EO 13302, 68 FR 27429 (May 20, 2003).

Section 1. Policy. The increased production and transmission of energy in a safe and environmentally sound manner is essential to the well-being of the American people. In general, it is the policy of this Administration that executive departments and agencies (agencies) shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy.

Sec. 2. Actions to Expedite Energy-Related Projects. For energy-related projects, agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections. The agencies shall take such actions to the extent permitted by law and regulation, and where appropriate.

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# National Energy Considerations

- National Energy Policy

<http://www.whitehouse.gov/energy/>

- Energy Act of 2005  
Public Law 109-58 (08/08/05)
- Renewables on Public  
Lands



# Selected Wildlife Authorities

- Endangered Species Act
- Migratory Bird Treaty Act
- Bald and Golden Eagle Protection Act



# ESA Prohibitions

- 16 U.S.C. § 1538. Prohibited acts
  - (a) Generally.
    - (1) Except as provided . . . with respect to any endangered species of fish or wildlife listed pursuant to [the ESA] it is unlawful for any person subject to the jurisdiction of the United States to-- \*\*\*
    - (B) take any such species within the United States or the territorial sea of the United States; \*\*\*
    - (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to [the ESA] and promulgated by the Secretary pursuant to authority provided by this Act.



# Migratory Bird Treaty Act

- Prohibitions
- 16 USCS § 703 Taking, killing, or possessing migratory birds unlawful

(a) In general. Unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in [Migratory Bird Treaties].



# Bald and Golden Eagle Protection Act (BGEPA)

Prohibition 16 U.S.C. § 668(a)

take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle... or any golden eagle, alive or dead, or any part, nest, or egg thereof . . . .



# Take Defined [ESA,MBTA,BGEPA]

- ESA 16 U.S.C. § 1532

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(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

- 50 C.F.R. § 17.3 Definitions.

Harass . . . means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. . . .

Harm . . . means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

- MBTA "Take Defined"

- 16 U.S.C. § 715n

. . . the word "take" shall be construed to mean pursue, hunt, shoot, capture, collect, kill, or attempt to pursue, hunt, shoot, capture, collect, or kill, unless the context otherwise requires.

- 50 C.F.R. § 10.12

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Take means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.

- BGEPA Take Defined

- 16 U.S.C. § 668c

. . . "take" includes also pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb . . .





# ESA PROCESSES

- Section 9 Prohibitions
- With Federal Nexus
  - Section 7(a)(1) Conservation Programs
  - Section 7(a)(2) Inter- and Intra-agency Consultation
- Absent Federal Nexus
  - Section 10 Incidental Take Permits
  - Consultation & NEPA



# ESA Section 7(a)(1)

- All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to the [ESA].



# ESA Section 7(a)(2)

- Inter-Agency Consultations § 7(a)(2)
- Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat .  
...
- Regulations 50 C.F.R. Part 402
  - Informal (no effect, not likely to adversely affect)
  - Formal (may affect)
    - timelines
    - biological opinion; jeopardy analysis; take coverage



# Examples of Federal Agency Action Potentially Triggering Consultation or Env. Review

- Agency Land Management or Permitting
- Rivers and Harbors Act Permitting
- Clean Water Act Wetlands Permitting
- Clean Water Act Discharge Permitting
- Grants & Loans
  - Dep't Agriculture
    - Title IX , Section 9006 of the 2002 Farm Bill
    - Renewable Energy systems and energy efficiency Improvements Program
  - Dep't of Energy
- FAA lighting
- Coast Guard Aids to Navigation
- NEPA 42 U.S.C. §§ 4321-4347
  - Action agency
  - Cat Ex, EA/FONSI/EIS
  - Public Participation
  - Alternatives Analysis



# ESA Incidental Take Permits

- 16 U.S.C. § 1539 (a)(1)(B)
  - may permit . . . any taking otherwise prohibited by section 9 of the ESA if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.



# ESA Incidental Take Permit Submission Criteria

- 16 U.S.C. § 1539 (a)(2)(A); 50 C.F.R. § § 17.22 (b), 17.32(b)
- No permit may be issued . . . unless the applicant . . . submits . . . a conservation plan that specifies—
  - (i) the impact which will likely result from such taking;
  - (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
  - (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
  - (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.



# ESA Incidental Take Permit Issuance Criteria

- 16 U.S.C. §1539(a)(2)(B); 50 C.F.R. Part 13 & § § 17.22 (b), 17.32(b)
- If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that—
- (i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the plan will be provided;
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
- (v) the measures, if any, required under subparagraph (A)(iv) will be met;

and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.



# Migratory Bird Treaty Act

- Treaties & Statute
- Prohibitions
- No Incidental Take Coverage
- Guidance
- Enforcement
- Executive Order
- Collection/Salvage Permits





# MBTA Executive Order

- EO 13186, Responsibilities of Federal Agencies To Protect Migratory Birds, 66 FR 3853 (January 17, 2001).

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Sec. 3. Federal Agency Responsibilities. (a) Each Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations.



# MBTA MOU CONTENTS

(1) . . .[integrate] bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions;

(2) restore and enhance the habitat of migratory birds, as practicable;

(3) prevent or abate the pollution or detrimental alteration of the environment for the benefit of migratory birds, as practicable;

(4) design migratory bird habitat and population conservation principles, measures, and practices, into agency plans and planning processes (natural resource, land management, and environmental quality planning, including, but not limited to, forest and rangeland planning, coastal management planning, watershed planning, etc.) as practicable, and coordinate with other agencies and nonfederal partners in planning efforts;

(5) promote programs and recommendations of comprehensive migratory bird planning efforts such as Partners-in-Flight, U.S. National Shorebird Plan, North American Waterfowl Management Plan, . . .;

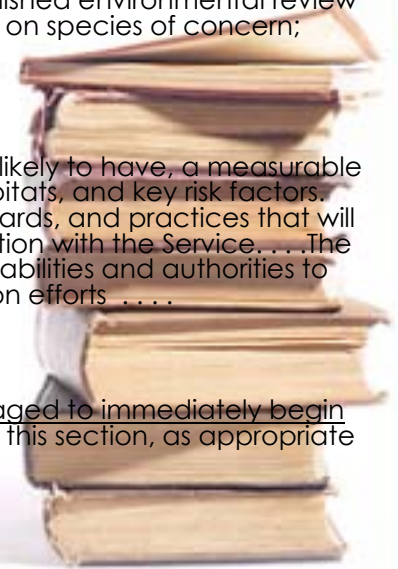
(6) ensure that environmental analyses of Federal actions required by the NEPA or other established environmental review processes evaluate the effects of actions and agency plans on migratory birds, with emphasis on species of concern;

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(9) identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations, focusing first on species of concern, priority habitats, and key risk factors. With respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. . . .The agency also shall inventory and monitor bird habitat and populations within the agency's capabilities and authorities to the extent feasible to facilitate decisions about the need for, and effectiveness of, conservation efforts . . . .

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(f) Notwithstanding the requirement to finalize an MOU within 2 years, each agency is encouraged to immediately begin implementing the conservation measures set forth above in subparagraphs (1) through (15) of this section, as appropriate and practicable.



# MBTA Special Purpose Permits

- 50 C.F.R. Parts 13 & 21  
(generally MBTA, but  
overlap with ESA/BGEPA)
  - Scientific Collection
  - Special Purpose
    - Salvage
    - Possession



# Bald and Golden Eagle Protection Act

- Statute
- Prohibitions
- Bald Eagle Delisting
- Definition of “Disturb”
- No Incidental Take Coverage
- Enforcement
- Scientific/Salvage Permits



# Federal Land Management

- National Wildlife System Improvement Act
  - 16 U.S.C. § 668dd *et seq.*
  - 50 C.F.R. Parts 25-29
    - Compatibility
    - Special Use Permits
    - Rights-of-Way
    - NEPA compliance
- Federal Cave Resources Protection Act
  - Prohibition 16 U.S.C. § 4306
  - knowingly destroys, disturbs, defaces, mars, alters, removes or harms any significant cave or alters the free movement of any animal or plant life into or out of any significant cave located on Federal lands . . . .
  - Regulations 50 C.F.R. Part 37
- National Park Service Organic Act
  - 16 U.S.C. § 1 *et seq.*
  - 36 C.F.R. Parts 1-6
  - National Park Service Management Policy [2001]
- Wild and Scenic Rivers Act 16 U.S.C. § 1271 *et seq.*
- Wilderness Act 16 U.S.C. § 1131 *et seq.*



# Examples of Other Department of the Interior Commenting Authority

- Fish and Wildlife Coordination Act [16 U.S.C. §§ 661-667e]
- Fish and Wildlife Act of 1956 [16 U.S.C. §§ 742a-742j, not including 742 d-l]
- Great Lakes Fish and Wildlife Restoration Act [16 U.S.C. § 941 *et seq.*]
- Federal Aid in Restoration Acts [16 U.S.C. §§ 669-669i, 777-777k]



# U.S. Coast Guard Process

- Aids to Navigation 14 U.S.C. § 85; 33 C.F.R. Parts 62-67
  - Mark navigable channels and waterway, adjacent obstructions
  - Light, Marking, and Signal Requirements
    - Consistent with IALA (Int'l Association of Lighthouse Authorities Maritime Bouyage System; 33 C.F.R. Part 62
- Private ATN
  - CG must authorize through District CO
  - Application and Approval Procedures 33 C.F.R. § 6601-1 to -55
- ATN on Fixed Structures
  - Applies to Structures constructed on or over the seabed in U.S. waters for purpose of “exploring for, developing, removing and transporting resources therefrom”
  - Lighting and signal requirements; 33 C.F.R. Part 67
  - Different Application Process



# Federal Aviation Admin. Process

- Objects Affecting Navigable Airspace; 14 C.F.R. Part 77
  - Establishes standards for determining if object is an obstruction/hazard
  - Notification of proposed activities; § 77.13
  - FAA acknowledges receipt, states how to comply with Marking and Lighting requirements in accordance with established criteria; § 77.19
- Advisory Circular 70/7460-1K
  - Obstruction Marking and Lighting
  - Type, placement, arrangement, intensity, strobing
  - Modifications/Deviations

